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 pages]

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA, et al.,**

Plaintiffs,

**v.**

**ANDREW WHEELER, et al.,**

Defendants,

**STATE OF GEORGIA, et al.,**

Intervenor-Defendants.

**Case No. 3:20-cv-03005-RS**

**JOINT CASE MANAGEMENT  
 STATEMENT**

Date: September 17, 2020  
 Time: 10:00 am  
 Courtroom: Courtroom 3 – 17<sup>th</sup> Floor  
 San Francisco Courthouse  
 Judge: The Honorable Richard Seeborg  
 Action Filed: May 1, 2020

The parties to the above-entitled action submit this Joint Case Management Statement pursuant to the Standing Order for All Judges of the Northern District of California-Contents of Joint Case Management Statement (Standing Order), Judge Seeborg's Standing Order re: Initial Case Management, and Civil Local Rules 16-5 (Procedure in Actions for Review on an Administrative Record) and 16-9 (Case Management Statement and Proposed Order).

Undersigned counsel for Plaintiffs<sup>1</sup>, Defendants<sup>2</sup>, and State Intervenor-Defendants<sup>3</sup> (together, the Parties), after having discussed the items enumerated in the Standing Order and applicable local rules, respectfully submit the following joint statement:

1. Jurisdiction and Service

All parties to this action have been served.

Plaintiffs contend that this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. § 702 (judicial review of agency action under the Administrative Procedure Act).

Defendants reserve the right to challenge subject-matter jurisdiction to the extent Plaintiffs fail to meet their burden of establishing their Article III standing at the summary judgment stage.

2. Facts:

On April 21, 2020, Defendants promulgated “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States’” (2020 Rule or Rule), which delineates the waters that are protected by the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA or Act). 85 Fed. Reg. 22,250 (Apr. 21, 2020). The 2020 Rule replaced the “Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (Oct. 22, 2019) (2019 Rule). According to Plaintiffs, the 2020 Rule narrows the definition of “waters of the United States,” categorically excludes many ephemeral streams and wetlands from the definition’s scope, and eliminates interstate waters as a category of waters protected by the Act.

On May 1, 2020, Plaintiffs filed this lawsuit, seeking judicial review of the 2020 Rule under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA).

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<sup>1</sup> Plaintiffs are the States of California, New York, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental Quality, the District of Columbia, and the City of New York.

<sup>2</sup> Defendants are the United States Environmental Protection Agency (EPA), EPA Administrator Andrew Wheeler, the United States Army Corps of Engineers (Army Corps), and Assistant Secretary of the Army for Civil Works R.D. James.

<sup>3</sup> State Intervenor-Defendants are the States of Georgia, West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.

On June 2, 2020, Defendants filed a certified administrative record index for the 2020 Rule. ECF No. 115-2.

On June 10, 2020, the Court granted State Intervenor-Defendants' motion to intervene and deemed their answer to the complaint filed on the same date. ECF No. 160.

Defendants filed their answer to the complaint on August 10, 2020.

On August 31, 2020, Defendants filed an amended certified administrative record index for the 2020 Rule. ECF No. 206-2.

### 3. Legal Issues

Plaintiffs allege that the 2020 Rule is arbitrary and capricious, an abuse of discretion, and not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A), and must be vacated and set aside.

Defendants and State Intervenor-Defendants dispute these claims.

### 4. Motions

#### A. Prior Motions

- Plaintiffs' Motion for a Preliminary Injunction or Stay: This motion was filed on May 18, 2020. ECF No. 30. The Court heard oral argument on June 18, 2020 and denied the motion on June 19, 2020. ECF No. 171.<sup>4</sup>
- Sacketts' Motion to Intervene: This motion was filed on May 21, 2020. ECF No. 45. The Court ruled that the motion would be resolved without oral argument under Civil Local Rule 7-1(b). ECF No. 80. The motion was denied on August 13,

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<sup>4</sup> In addition, the following motions pertaining to Plaintiffs' Motion for a Preliminary Injunction or Stay have been filed: Plaintiffs' Motion for Order Shortening Time, ECF No. 32, which was granted (ECF No. 33); Defendants' Motion for Reconsideration, Opposition to Plaintiffs' Motion for Order Shortening Time, and Cross-motion for Order for Enlargement of Time, ECF No. 34, which was denied (ECF Nos. 37 and 64); the Institute for Policy Integrity's Motion for Leave to File Amicus Curiae Brief in support of Plaintiffs' Motion for a Preliminary Injunction or Stay, ECF No. 55, which was granted (ECF No. 80); American Fisheries Society, et al.'s Motion for Leave to File Amici Curiae Brief in support of Plaintiffs' Motion for a Preliminary Injunction or Stay, ECF No. 68, which was granted (ECF No. 80); Duarte Nursery Inc.'s Motion for Leave to File Amicus Curiae Brief in opposition to Plaintiffs' Motion for a Preliminary Injunction or Stay, ECF No. 105 (the Court has not ruled on this motion); Freeport-McMoran, Inc.'s Motion to File a Brief as Amicus Curiae in opposition to Plaintiffs' Motion for a Preliminary Injunction or Stay, ECF No. 129 (the Court has not ruled on this motion); and the Sacketts' Motion for Order Shortening Time, ECF No. 78, which was denied (ECF No. 80).

2020, ECF No. 200, but the Court has allowed the Sacketts to file an Amicus Curiae Brief. *Id.* The Sacketts have since filed a notice of appeal challenging the order denying their motion to intervene. ECF No. 201.

- Proposed Business Intervenors' Motion to Intervene: This motion was filed on May 21, 2020. ECF No. 43. The Court ruled that this motion also would be resolved without oral argument. ECF No. 80. The motion was denied on August 13, 2020, ECF No. 200, but the Court has allowed the Proposed Business Intervenors to file an Amicus Curiae Brief. *Id.*
- State Intervenor-Defendants' Motion to Intervene: This motion was filed on June 1, 2020. ECF No. 107. The Court granted the motion on June 10, 2020. ECF No. 160.<sup>5</sup>

#### B. Motion to Complete/Supplement the Administrative Record

The certified administrative record index filed by Defendants on June 2, 2020 (ECF No. 115-2) (AR Index) and the amended certified administrative record index filed on August 31, 2020 (ECF No. 206-2) (Amended AR Index) include hyperlinks to access the documents in the record contained on the docket for the 2020 Rule (Docket ID: EPA-HQ-OW-2018-0149) regulations.gov. However, neither the AR Index nor the Amended AR Index provides access to all documents in the record. In late July 2020, Plaintiffs informed Defendants that they are unable to access all documents in the administrative record and requested electronic access to all documents in the administrative record. Defendants did not provide electronic access to or otherwise produce these documents but on September 8, 2020, Defendants provided a list of documents that are not accessible on the docket for the 2020 Rule at regulations.gov, and therefore cannot be electronically accessed by Plaintiffs. According to Defendants, these documents include roughly 230 documents that may be copyrighted material as well as physical files in a file size/format that is not accessible on the docket. Defendants have stated they can provide these documents to Plaintiffs and Intervenor Defendants only if the Parties enter into a

<sup>5</sup> State Defendant-Intervenors also filed a Motion to Expedite Review of Motion to Intervene, ECF No. 143, which was granted (ECF No. 146).

1 protective order governing the use of such documents. The Parties will endeavor to reach an  
2 agreement on a protective order related to the production of the copyrighted materials pursuant to  
3 the schedule outlined in paragraph 17 below. If the Parties fail to reach such an agreement by the  
4 deadlines in paragraph 17, Plaintiffs will likely file a motion to complete/supplement the  
5 administrative record.

6 If the Parties are unable to agree on the terms of a protective order allowing for the  
7 production of the documents that Defendants assert are copyrighted, the Parties will meet and  
8 confer regarding a motion to complete/supplement the administrative record and will provide the  
9 Court with a proposed briefing schedule for that motion by September 29, 2020.

10 C. Cross-Motions for Summary Judgment

11 The Parties anticipate resolving this matter through cross-motions for summary judgment.  
12 The Parties' proposed briefing schedule for the cross-motions is provided in paragraph 17, below.

13 5. Amendment of Pleadings

14 No amendments are anticipated by any party.

15 6. Evidence Preservation

16 The Parties have reviewed the Guidelines Relating to the Discovery of Electronically  
17 Stored Information (ESI Guidelines). Plaintiffs do not anticipate that any issues will arise  
18 regarding the preservation of evidence but have requested that Defendants take reasonable and  
19 proportionate steps to preserve potential evidence relevant to the issues in this action.

20 7. Disclosures

21 The Parties agree that initial disclosures are not required (or necessary) under Fed. R. Civ.  
22 P. 26(a)(1)(B)(i).

23 8. Discovery

24 The Parties do not anticipate discovery.

25 9. Class Actions

26 This case is not a class action.

27 10. Related Cases

There are challenges to the 2020 Rule pending in other district courts: *Colorado v. EPA*, Case No. 20-cv-01461 (D. Colo.); *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz.); *Chesapeake Bay Found., Inc. v. EPA*, No. 1:20-cv-01064 (D. Md.); *Conservation Law Found. v. EPA*, No. 1:20-cv-010820 (D. Mass.); *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687 (D.S.C.); *Navajo Nation v. Wheeler*, No. 2:20-cv-602 (D.N.M.); *N.M. Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-988 (D.N.M.); *Murray v. Wheeler*, No. 1:19-cv-1498 (N.D.N.Y.); *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-564 (D. Or.); *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-950 (W.D. Wash.); *Environmental Integrity Project v. Wheeler*, 1:20-cv-1734 (D.D.C.); *Wa. Cattlemen's Ass'n v. EPA*, No. 2:19-cv-569 (W.D. Wash.).

#### 11. Relief

Plaintiffs seek: (a) a declaratory judgment that, in promulgating the 2020 Rule, Defendants acted arbitrarily, capriciously, contrary to law, and abused their discretion; (b) an order vacating and setting aside the 2020 Rule; (c) an award of Plaintiffs' reasonable fees, costs, expenses, and disbursements, including attorneys' fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and (d) such additional and further relief as the Court deems just, proper and necessary.

Defendants and State Intervenor-Defendants deny that Plaintiffs are entitled to any relief.

#### 12. Settlement and ADR

The Parties have complied with ADR Local Rule 3-5 and have discussed the various ADR options provided by this court and private entities. The Parties do not believe that ADR is appropriate.

#### 13. Consent to Magistrate Judge for All Purposes

Defendants have declined to consent to have a magistrate judge conduct all further proceedings, including trial and entry of judgment.

#### 14. Other References

The Parties do not believe that this case is suitable for reference to binding arbitration, special master, or the Judicial Panel for Multidistrict Litigation.

#### 15. Narrowing of Issues

The Parties do not believe that it is possible to narrow the issues.

1           16. Expedited Trial Procedure

2           The Parties anticipate that the case will be resolved on summary judgment. No trial is  
3 expected to occur.

4           17. Scheduling

5           The Parties agree that departure from the default deadlines set forth in Local Rule 16-5 is  
6 appropriate in this matter. The Parties request oral argument on their cross-motions for summary  
7 judgment.

8           A. The Parties' Proposed Schedule Regarding Production of All Documents in the  
9 Administrative Record for the 2020 Rule

10          The Parties discussed the production of the documents in the administrative record that  
11 Defendants assert are copyrighted and/or are physical files that are part of the administrative  
12 record but are not accessible on the docket for the 2020 Rule at regulations.gov and have not been  
13 produced, and were able to agree as follows:

Deadline	Action
September 15, 2020	Defendants will provide Plaintiffs and State Intervenor with a draft protective order regarding access to and use of the documents that are part of the administrative record but are not accessible on the docket for the 2020 Rule because Defendants contend they are copyrighted.
September 17, 2020	Defendants will provide Plaintiffs and State Intervenor with electronic or hard copies of the physical files that are part of the administrative record and are not subject to copyright but are in a file size/format that is not accessible on the docket.
September 22, 2020	If the Parties reach an agreement on the terms of a proposed protective order, Defendants will file the proposed protective order with the Court.
September 29, 2020	The Court, in its discretion, will sign the proposed protective order.
September 30, 2020	If a protective order is entered, Defendants will provide Plaintiffs, State Intervenor, and the Court with electronic access to all



documents in the administrative record, including copyrighted documents.

B. The Parties' Proposed Briefing Schedules for Cross-Motions for Summary Judgment

The Parties were unable to reach an agreement on the briefing schedule for the cross-motions for summary judgment, but were able to agree on the page limits for each party's briefs.

Plaintiffs' Proposed Briefing Schedule

Assuming Defendants provide all Parties and the Court with electronic access by the deadlines set forth above to the entire administrative record, including all documents that Defendants assert are copyrighted and copies of all physical files in the administrative record that are in a file size/format that is not accessible on the docket of the 2020 Rule, Plaintiffs respectfully propose the following briefing schedule:

<u>Deadline</u>	<u>Action</u>
November 23, 2020	Plaintiffs shall file their motion for summary judgment along with a supporting memorandum which shall not exceed 45 pages of text.
January 22, 2020	<ul style="list-style-type: none"> <li>Defendants shall file a combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages of text.</li> <li>State Intervenor-Defendants shall file an opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 25 pages of text.</li> </ul>
February 17, 2021	All amicus briefs shall be filed. Amicus briefs shall not exceed 25 pages of text.
March 15, 2021	Plaintiffs shall file one combined brief consisting of their reply in support of summary judgment and their oppositions to Defendants' cross-motion for summary judgment and State Intervenor-Defendants' and any other defendant-intervenors' (if any) cross-motion for summary judgment. Plaintiffs' combined reply/oppositions to the cross-motions for summary judgment shall not exceed 50 pages of text.



May 6, 2021	<ul style="list-style-type: none"> <li>Defendants shall file their reply in support of their cross-motion for summary judgment, which shall not exceed 35 pages of text.</li> <li>State Intervenor-Defendants shall file their reply in support of their cross-motion for summary judgment, which shall not exceed 15 pages of text.</li> </ul>
Earliest available date no sooner than 21 days after briefing on the cross-motions for summary judgment is completed	Hearing on cross-motions for summary judgment.

Defendants' Proposed Briefing Schedule

Defendants respectfully propose the following briefing schedule:

<u>Deadline</u>	<u>Action</u>
October 28, 2020	Plaintiffs shall file their motion for summary judgment along with a supporting memorandum which shall not exceed 45 pages of text.
December 21, 2020	<ul style="list-style-type: none"> <li>Defendants shall file a combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages of text.</li> <li>State Intervenor-Defendants shall file an opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 25 pages of text.</li> </ul>
January 12, 2021	All amicus briefs shall be filed. Amicus briefs shall not exceed 25 pages of text.
February 12, 2021	Plaintiffs shall file one combined brief consisting of their reply in support of summary judgment and their oppositions to Defendants' cross-motion for summary judgment and State Intervenor-Defendants' and any other defendant-intervenors' (if any) cross-motion for summary judgment. Plaintiffs' combined reply/oppositions to the cross-motions for summary judgment shall not exceed 50 pages of text.
March 31, 2021	<ul style="list-style-type: none"> <li>Defendants shall file their reply in support of their cross-motion for summary judgment, which shall not exceed 35 pages of text.</li> </ul>

	<ul style="list-style-type: none"> <li>State Intervenor-Defendants shall file their reply in support of their cross-motion for summary judgment, which shall not exceed 15 pages of text.</li> </ul>
Earliest available date no sooner than 21 days after briefing on the cross-motions for summary judgment is completed	Hearing on cross-motions for summary judgment.

### State Intervenor-Defendants' Proposed Briefing Schedule

The State Intervenor-Defendants prefer the agencies' proposed briefing schedule but likely would agree to a different schedule if the plaintiffs and agencies are able to reach an agreement at a later date.

#### 18. Trial

The Parties anticipate that this case will be resolved by summary judgment, so do not anticipate a trial. The Parties expect that any summary judgment hearing that the Court schedules will require approximately two hours.

#### 19. Disclosure of Non-party Interested Entities or Persons

Civil Local Rule 3-15 does not apply to any government entity or its agencies, including Plaintiffs, Defendants, and State Intervenor-Defendants.

#### 20. Professional Conduct

All attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

#### 21. Other

The Parties are not aware of any other matters that may facilitate the just, speedy, and inexpensive resolution of this matter.

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Dated: September 10, 2020

Respectfully Submitted,

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